1986

State of Utah v. Melvin Dean Frame : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

~~19862~~ 1002

STATE OF UTAH, :

Plaintiff-Respondent, :

-v- : Case No. 02-1002

MELVIN DEAN FRAME, : Category No. 2

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION AND JUDGMENT OF SECOND DEGREE MURDER, A FIRST DEGREE FELONY, IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR UINTAH COUNTY, STATE OF UTAH, THE HONORABLE RICHARD C. DAVIDSON, JUDGE, PRESIDING.

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-v-	:	Case No. 02-1002
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BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED

POINT I

Was evidence that, before defendant fatally stabbed Charles Bovee, defendant had threatened to "mess [the victim] up" and that defendant threatened to stab the victim and was only concerned that, if he did, a witness would tell the police, sufficient to establish that defendant: intended to kill the victim; intended to cause the victim serious bodily harm; or, acting with depraved indifference to human life, engaged in conduct creating a gross risk of death to another?

POINT II

Did defendant meet his burden of proving that defense counsel, acting in a manner that was not within the realm of reasonable trial tactics, rendered a performance that was deficient in some demonstrable manner and that, absent that deficiency, it is reasonably likely that the verdict would have been different?

STATEMENT OF THE CASE

Defendant, Melvin Dean Frame, was charged with second degree murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (Supp. 1983) (R. 1).

Defendant was convicted in a jury trial held September 12 and 13, 1985, in the Seventh Judicial District Court in and for Uintah County, State of Utah, the Honorable Richard C. Davidson, Judge, presiding (Tr. 309). Defendant was sentenced by Judge Davidson on October 6, 1985 to an indeterminate term of five years to life in the Utah State Prison (Transcript of Hearing in Motion for New Trial 7-8).

STATEMENT OF THE FACTS

On or about July 5, 1985, defendant agreed to accompany Charles Bovee, aka "Huck," and William Otto on a trip from Denver to Grand Junction, Colorado (Tr. 236-37). They were to travel in Bovee's blue Ford truck (Tr. 237). En route to Grand Junction, about twenty-five miles west of Denver, the trio picked up a hitchhiker, Emmanuel Randy Shaffer (Tr. 122). The group reached Grand Junction on July 6, 1985 (Tr. 126). They spent two nights in that area and then proceeded toward Vernal, Utah (Tr. 126-29).

They reached Vernal at about noon. Bovee and Otto went into the Gateway saloon while defendant and Shaffer slept. They left the saloon about an hour later (Tr. 129). Bovee then visited his sister's house and took from there a leather jacket that they sold to buy liquor (Tr. 130). The group went swimming, ate some lunch, drank some more beer and then went back to the Gateway saloon (Tr. 131). All four travelers entered the bar.

After a while Bovee told defendant and Shaffer that they should go try to make some money. Shaffer and defendant went outside and spotted two sleeping bags. They decided to steal the bags so they could sell them (Tr. 132-33). While they were stealing the bags, Shaffer noticed that a woman was watching them. They completed the theft and hid in the weeds until Otto came out of the saloon. Otto spoke to the woman who witnessed the theft and went back into the bar. Defendant and Shaffer returned to the saloon to convince Bovee and Otto that they should leave before the woman called the police (Tr. 133-34). Bovee was angry at defendant and Shaffer because they had placed the stolen items in his truck (Tr. 134).

All four left the saloon. Bovee was driving the truck and Otto was riding in the passenger seat. Defendant and Shaffer were riding in the bed of the truck. While they were stopped at a stop light defendant and Shaffer heard Bovee complain that they had ruined his chances of getting a job by stealing the sleeping bags (Tr. 137). Defendant was stabbing a mattress with his knife, he told Shaffer that if Bovee "messed with him again he would mess him up." (Tr. 137-38). Defendant also asked Shaffer if he would tell the police if defendant stabbed Bovee (Tr. 138).

Bovee pulled the truck into the parking lot of the Yellow Front store. Bovee and Otto stepped out of the truck and began fighting. Shaffer and defendant jumped out of the truck. Defendant kicked Bovee in the face a couple of times and then Shaffer pulled Otto off Bovee (Tr. 140-41). Bovee Stood up and kicked defendant (Tr. 142). Defendant lunged toward Bovee,

waiving his knife in the air (Tr. 114, 120) and Otto rejoined the scuffle. Bovee then staggered back into the street clutching his chest (Tr. 142-44). Otto ran and started the truck. Defendant stood for a minute, with his knife still in his hand, and then jumped into the back of the truck (Tr. 144-45). Shaffer remained at the scene and tried to assist Bovee. Defendant and Otto drove off (Tr. 146).

Bovee died shortly thereafter of a knife wound to the left chest (Tr. 175). The state medical examiner testified that the wound had been inflicted with such force that the fifth rib was completely severed and the knife pierced the right posterior ventricular wall of the heart (Tr. 198).

Defendant and Otto were almost immediately pulled over and taken into custody by the Roosevelt city police (Tr. 160-66). The truck was impounded and subsequently searched. The search revealed a knife hidden next to the spare tire in the bed of the truck (Tr. 188). The knife was sent to state crime lab. The lab verified that there was human blood on the blade of the knife (Tr. 229-30).

The victim, Mr. Bovee, was wearing a knife in a sheath on his belt during the fight. However, the evidence indicates that the knife remained in its sheath throughout the incident. An officer removed the knife, still in its sheath, from the victim after the stabbing. The knife was tested at the state crime lab. There was human blood on the knife handle; however the only blood on the blade was not of human origin (230-31).

An eyewitness to the fight testified that Bovee, who was dressed in a light blue shirt and was barefoot (Tr. 145), was in the center of the fight trying to fend off both defendant, who was not wearing a shirt (Tr. 145), and Otto. Shaffer was trying to break up the fight (Tr. 101-02).

The evidence indicated that defendant was intoxicated at the time of the stabbing. His blood alcohol level two hours after the incident was .17 percent (Tr. 204). However, expert testimony established that at blood alcohol levels as high as .2 which would account for metabolism from the time of the stabbing to the time of the blood test, a person is able to understand the consequences of their actions (Tr. 214). Further, the officer that arrested defendant shortly after the stabbing testified that, although he could tell defendant had been drinking, defendant was not intoxicated to the point that he was unable to understand (Tr. 262).

SUMMARY OF ARGUMENTS

POINT I

The facts indicate that, before defendant fatally stabbed Charles Bovee, he threatened to "mess [the victim] up." Further, the evidence indicated that defendant, while he was considering stabbing the victim, expressed only one concern-whether or not a witness would tell the police about the stabbing. Defendant then entered a fight between the victim and another person. Defendant took an unsheathed knife into the fight, although the victim fought only with his bare hands and feet. During the fight, defendant stabbed the victim with enough

force to completely sever a rib and pierce the victim's heart. Defendant had been drinking prior to the altercation; however, the evidence indicated that he was not intoxicated to the point of being unable to understand the consequences of his actions.

In view of that evidence, it was reasonable for the jury to conclude that defendant intended to kill Charles Bovee, or at least intended to cause the victim serious bodily harm. The jury could also have reasonably concluded that defendant, acting under circumstances that showed depraved indifference to human life, engaged in conduct that caused a gross risk of death to another. Consequently, the evidence was sufficient to support the verdict of second degree murder.

POINT II

In order to sustain a claim of ineffective counsel, defendant must prove: (1) that his counsel rendered a deficient performance in some demonstrable manner; (2) that performance was not within the wide range of actions that might be considered reasonable trial tactics; and (3) the outcome of the trial would probably have been different but for counsel's error.

Defendant claims that counsel's performance was ineffective because he was the only witness called on behalf of the defense. However, defendant does not explain who else should have been called or what impact the additional witnesses would have had on the outcome of the trial. Therefore defendant has failed to show that counsel's performance was deficient in some demonstrable manner, beyond the scope of reasonable trial tactics or that, without the defect, the verdict would have been

different. Defendant also failed to explain how the alleged failure of counsel to prepare him to testify affected his testimony or how the verdict would have been different if he had been thoroughly coached before he testified. Therefore, defendant has failed to prove that counsel's performance was ineffective because he failed to adequately prepare defendant to testify. Defendant further alleges that counsel's performance was ineffective because he failed to raise enough objections during trial. Defendant points to only once instance supporting that contention-where the court noted that the prosecutor had been asking leading questions without objection from defense counsel. However, this will not support a claim of ineffective counsel because it is generally held that the decision of whether or not to object to leading questions is a matter of trial strategy. Moreover, the crucial evidence was elicited without improper questioning. Therefore it is unlikely that the verdict would have been different even if counsel had objected to the leading questions. Further, counsel did not render a deficient performance simply because he failed to raise an objection for cause against Juror Smuin and did not remove her with a peremptory challenge. Whether or not to remove a juror is a tactical decision and counsel is not obligated to raise objections that would be fruitless. Juror Smuin only expressed a belief that, because someone died, somebody, somewhere was responsible. She maintained that she had no preconceived notions about defendant's guilt and indicated that she could give defendant a fair trial. Such light impressions are not the sort

that evidence implied bias and would not have justified excusing Ms. Smuin for cause. Therefore, defense counsel properly abstained from raising an objection for cause. Defense counsel's opening and closing arguments were also well within the realm of reasonable trial tactics as they appropriately marshalled the facts for the jury and directed the jury's attention to the court's instructions on the crucial law. Further any deficiency in those arguments was cured through detailed jury instructions; therefore it is unlikely that, absent the deficiency, the verdict would have been different.

Finally, looking at counsel's performance as a whole, it is apparent that he competently and zealously represented the interest of defendant. Counsel sought and obtained suppression of evidence gathered in violation of defendant's right to privacy. Counsel cross-examined the State's witnesses and argued to the court that the State failed to prove the mens rea necessary to make out a prima facie case of second degree murder. In view of the strong evidence against defendant, it is not surprising that counsel's tactics did not succeed. Therefore, defendant has failed to meet his burden of proving that counsel's performance did not meet constitutional standards.

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT OF SECOND DEGREE MURDER.

Defendant claims that the evidence was insufficient to support a verdict of second degree murder. The jury was properly instructed, in accord with Utah Code Ann. § 76-5-203 (Supp.

1983), that in order to find defendant guilty of second degree murder they must determine.

> (a) That the defendant, Melvin Dean Frame, intentionally or knowingly caused the death of Charles Kevin Bovee at the time and place alleged in the information, or (b) intending to cause serious bodily injury to another did commit an act clearly dangerous to human life that caused the death of Charles Kevin Bovee, or, (c) Acting under circumstances evidencing a depraved indifference to human life, he engaged in contact which created a gross risk of death to another and thereby caused the death of Charles Kevin Bovee.

(R. 62). Although the general verdict did not reveal which section the jury relied on to convict the defendant, the evidence was sufficient to support the verdict under any of the alternatives set out in the instruction.

This Court's standard of review for sufficiency of the evidence is that the jury's determination should be reversed only if, after viewing the evidence in the light most favorable to the verdict, the Court finds that it "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Royball, 669 P.2d 1338, 1339 (Utah 1984) citing State v. Petree, 689 P.2d 443, 444 (Utah 1983); State v. Watts, 675 P.2d 566, 568 (Utah 1983) (applying the standard of review to a verdict of second degree murder).

In the instant case there is sufficient credible evidence that defendant intentionally or knowingly caused the death of Charles Bovee to justify a verdict of second degree murder under Utah Code Ann. § 76-5-203(a). The evidence indicated that prior to the altercation defendant had been

stabbing a styrofoam mattress in the back of the truck with his knife. Defendant explained that he liked to stick his knife into things (Tr. 251). During that time defendant heard Mr. Bovee make derogatory statements about him. Defendant turned to Mr. Shaffer and stated that, if Bovee messed with him, he would mess him (Bovee) up. Defendant also asked Mr. Shaffer if he would tell the cops if defendant stabbed Bovee. When the fight started between Bovee and Otto, defendant jumped out of the truck with his knife in. He kicked Bovee in the head several times while Otto was holding Bovee down. Bovee stood up and kicked defendant with his bare foot. Defendant again started to fight with Bovee and, almost immediately, Mr. Bovee sustained a mortal knife wound to the chest that was administered with sufficient force to cut entirely through a rib and pierce the heart.

Viewed in a light most favorable to the verdict, it was reasonable for the jury to conclude, from defendant's statements and the force of the blow that killed Mr. Bovee, that defendant intended to kill the decedent. Further, the jury could have concluded that, because defendant admitted that he liked to play with his knife, defendant knew the dangers of the weapon and knew that entering a fight with the weapon in hand and thrusting the knife at a person's chest was reasonably certain to cause death. Therefore, the jury could have found that defendant knowingly caused the death of Charles Bovee.

Moreover, even if the evidence is somehow viewed as insufficient to prove that defendant intentionally or knowingly caused the death of Charles Bovee, it was certainly sufficient to

establish that he caused the death while intending to commit serious bodily injury, thereby justifying a verdict of second degree murder under § 76-5-203(b). Defendant's statements, to the effect that he would "mess up" the decedent and was considering stabbing him, amply evidence his intent to cause serious bodily injury. That intent was played out first when defendant kicked the victim in the head and then when he continued to fight with the victim, while waiving his knife in the air, subsequently stabbing him.

Defendant infers that he was unable to form the specific intents needed to satisfy § 76-5-203(a) & (b) because he was intoxicated. Defendant's premise is correct; intoxication can be a defense to a crime if it negates the existence of a mental state that is an element of the offense. Utah Code Ann. § 76-2-306 (1978). However, in order to establish a defense of voluntary intoxication one must do more than simply show that they had been drinking and were intoxicated before the incident in question. In order to establish such a defense, one must prove that, due to the intoxication, their mind was affected to such a degree that they did not have the ability to form the requisite specific intent. State v. Wood, 648 P.2d 71, 90 (Utah 1982). In the instant case the defendant failed to meet that standard.

In addition to defendant's own statements prior to the altercation, which indicated his mental awareness of the situation, the State's expert testimony indicated that an individual with a blood alcohol level equivalent to that of

defendant two hours after the stabbing, would be able to understand what they were doing and the consequences of their actions. The expert also stated that an individual with a blood alcohol even greater than defendant's (to account for metabolism between the stabbing and the blood test) would be able to understand their actions and the consequences thereof. Further, the officer that arrested defendant shortly after the stabbing testified that defendant seemed perfectly able to understand. This opinion was corroberated by the officer who interrogated defendant after the killing. Under those circumstances, there is no indication that defendant's drinking impaired his ability to form the requisite mens rea for second degree murder under § 76-5-203(a) & (b).

Finally, the evidence is sufficient to establish that defendant, acting under circumstances evidencing depraved indifference to human life, engaged in conduct that created a grave risk of death to another thereby causing the death of Charles Bovee. Consequently, the jury was justified in finding defendant guilty of second degree murder under § 76-5-203(c).

The standard for depraved indifference under § 76-5-203(c) was explained by this Court in State v. Fontana, 680 P.2d 1042, 1047 (Utah 1984), where the court required a showing that:

> 1. The defendant engaged in conduct that created a grave risk of death to another; and
> 2. At the time he so acted, the defendant knew that his conduct created a grave risk of death to another; and
> 3. The circumstances under which the defendant acted, objectively viewed by a reasonable man rather than subjectively by the actual state of defendant's mind, were such as to evidence a depraved indifference

to human life; and
4. The defendant thereby unlawfully caused the death of another.

In Fontana, an expert marksman was driving down the road and became angry with another driver who cut in front of his vehicle. The marksman taunted the other driver for a distance, then pulled beside him at a stoplight, aimed a gun at his head, and fired. The Court found that the standard for depraved indifference was met because the act clearly posed a grave risk of death and the marksman could not have failed to know of that risk. Id. at 1046.

In State v. Bolsinger, 699 P.2d 1214, 1219 (Utah 1985) the Court reiterated the standard for depraved indifference set forth in Fontana. However, in Bolsinger, the Court found that the standard was not met. In Bolsinger, the defendant and the decedent were involved in consensual sexual activities. The decedent was interested in sexual experimentation. The defendant, during intercourse, wrapped an electrical cord around the decedent's neck and pulled lightly for a very short time causing a loss of blood to the decedent's brain, which resulted in her death. The expert testimony indicted that the ease of the killing was partly due to alcohol in the victim's system and partly due to the fact that the defendant was lying on top of her when the ligature was applied.

The Court in Bolsinger emphasized that in order to be guilty of second degree murder under the depraved indifference standard a defendant must know that his conduct creates a grave risk of death to another. Id. at 1219. The Court concluded that

reasonable minds must entertain some doubt that the defendant knew that the very short, light, ligature, compounded with the victim's intoxication and defendant's own weight, would pose a grave risk of death. Id. Therefore, the Court concluded that the defendant could not be found guilty of second degree murder under the depraved indifference standard. Id. at 1220-21.

The instant case is analogous to Fontana. The evidence indicates that defendant knew that using the knife could cause grave risk of death. He even asked Mr. Shaffer if he would tell the police if such a stabbing occurred, a fact that not only demonstrates that defendant knew the knife was dangerous but shows that he considered the life he was endangering less important than the fact that he might get caught. Further, viewed from the prospective of a reasonable man, it is clear that using an unsheathed knife in a fight creates a grave risk of causing death. It is difficult to imagine that defendant, who admits that he liked to play with the knife, would be unaware of that danger. Consequently, the jury could easily have concluded that: defendant engaged in conduct that posed a grave risk of death to another; defendant knew that the conduct created such a risk; the circumstances under which the action was taken evidenced a depraved indifference to life--defendant contemplated the stabbing and his only concern was whether he would be reported to the police; and defendant thereby caused the death of Charles Bovee. Therefore, evidence was sufficient to support a verdict of second degree murder under § 76-5-203(c).

Defendant infers that the evidence was insufficient to support a verdict of second degree murder because Mr. Bovee was the initial aggressor in the fight against Mr. Otto. Defendant's argument is difficult to follow. He does not explain why he was compelled to enter the altercation between Otto and Bovee. He also does not explain why he was forced to use an unsheathed knife to defend against Bovee's bare feet and sheathed knife. In any event, the jury was thoroughly instructed on the law of self defense (R. 59-61). Defendant does not state why these instructions were not adequate to assert his defense. In these circumstances, the State is unable to discern the nature of defendant's complaint and the Court should refuse to speculate on an argument in order to resolve an undefined issue. See State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984).

Because the evidence was sufficient to support a finding of second degree murder under any of the three criteria set out in § 76-5-203, the jury's verdict should be affirmed.

POINT II

COUNSEL FOR DEFENDANT MET CONSTITUTIONAL STANDARDS FOR EFFECTIVE COUNSEL. THEREFORE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.

This Court has made it clear that "the decision to grant or deny a new trial is a matter of discretion with the trial court and will not be reversed absent a clear abuse of that discretion." State v. Williams, 24 Utah Adv. Rep. 3 (Dec. 9, 1985).

Defendant asserts that the trial court abused its discretion by refusing to grant a new trial based upon his claim of ineffective assistance of counsel. Defendant claims that his counsel was ineffective because: 1. Defendant was the only witness called on behalf of the defense; 2. defendant purportedly testified without adequate preparation by defense counsel; 3. defense counsel failed to make "timely objections to numerous prejudicial questions, statements and rulings as he objected only once during the entire trial;" 4. defense counsel failed to ask that Juror Shirley Smuin be dismissed for cause and failed to remove her with a peremptory challenge; 5. defense counsel's opening and closing arguments were inadequate. Defendant's claim of ineffective assistance of counsel is without merit. Therefore, the trial court did not abuse its discretion by refusing to grant a new trial based upon that claim.

In order to establish ineffective assistance of counsel "it is the defendant's burden to show: (1) that his counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel's error." State v. Geary, 707 P.2d 645, 646 (Utah 1985); see also Strickland v. Washington, _____ U.S. _____, 104 S.Ct. 2052, 80 L.Ed.2d 674, 693 (1984); State v. Lairby, 699 P.2d 1187, 1204 (Utah 1984) (adopting Strickland); Codianna v. Morris, 660 P.2d 1101, 1109 (Utah 1983). Failure to show either deficient performance or resulting prejudice will defeat a claim of ineffective counsel. State v. Geary, 707 P.2d at 646.

In Strickland, the Supreme Court held that, in order to show that counsel's performance was deficient, defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." 80 L.Ed.2d at 693. The Supreme Court further noted that "scrutiny of counsel's performance must be highly deferential," id. at 694, and that, due to the difficulties inherent in retrospectively evaluating counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'." Id. at 693-94; see also State v. Buel, 700 P.2d 710, 703 (Utah 1985).

The following discussion looks at each allegation on which defendant bases his claim of ineffective counsel and concludes that defendant, in every instance, fails to meet the burden of proof necessary to establish a violation of the sixth amendment right to effective counsel. Therefore, the trial court properly refused to grant a new trial based upon defendant's claim of ineffective counsel.

The first allegation of ineffective counsel is based upon the fact that defendant was the only witness called on behalf of the defense. This allegation fails for three reasons. First defendant fails to show that, because defendant was the only witness called by the defense, counsel's performance was demonstrably deficient. Defendant has not brought to the Court's

attention any other witnesses who should have been called on defendant's behalf. Nor has he stated how the illusive missing witnesses' testimony would have had a bearing on the trial. This Court has refused to sustain a claim of ineffective counsel based on such opaque and unsupported allegations. In State v. Lairby, 699 P.2d 1187, 1204 (Utah 1984), the defendant alleged that counsel was ineffective because he failed to attempt to impeach a State witness with prior inconsistent statements made at the preliminary hearing. This Court rejected the defendant's claim because he had not supplied the Court with the preliminary hearing transcript, had failed to explain the content of those statements, and had not stated how the statements would have been helpful. The Court held that, without more information, they could not consider whether the claimed error constituted ineffective assistance of counsel. Id. Similarly, in the instant case, without further information, it is impossible to determine whether failure to call witnesses, other than defendant, was improper. The Court is asked to speculate on the existence of such other witnesses and on the testimony they would give. In his opening statement, defense counsel admitted that all of the people, aside from defendant, who had witnessed or been involved in the incident in question, had been called by the State. Defense counsel said that, due to that circumstance, defendant would be the only witness called by the defense (Tr. 233). That raises a presumption that defense counsel believed that all essential witnesses had testified. Because defendant has not explained who was omitted, or what they would have

testified about, he has not met his burden or proving that counsel was deficient in some demonstrable manner.

In addition, defendant has failed to overcome the presumption that calling a single witness for the defense might be considered sound trial strategy. In fact, deciding what witnesses to call is one of the most important strategic decisions counsel makes. In the instant case, the State called several witnesses, including three people who saw the altercation in question. The only real issue at trial was whether defendant had the requisite mens rea for second degree murder. Defense counsel may very well have determined that the best, and perhaps the only, evidence of defendant's mental state would come from defendant's own testimony. Thus, the decision to call only defendant as a witness was likely a sound tactical choice. The fact that defense counsel's strategy did not produce the desired result does not lead to the conclusion that defendant was denied effective counsel. State v. Buel, 700 P.2d at 703. Consequently, defendant has failed to show that defense counsel's performance did not meet constitutional standards.

Finally, defendant has failed to demonstrate that the result of the trial would probably have been different if other witnesses had been called on defendant's behalf. As defense counsel noted in his opening statement, the State had called virtually all of the people who had either witnessed or investigated the stabbing of Charles Bovee. Consequently, it is unlikely that calling additional witnesses, with more attenuated links to the incident, could have made any difference in the

outcome of the trial. The only eyewitness that was not called at trial was William Otto. Defendant does not even attempt to explain how Mr. Otto's testimony could have impacted the outcome of the trial. In fact, absent such an explanation, it can reasonably be assumed that Mr. Otto's testimony would have been consistent with the testimony of the other three eyewitnesses. As merely cumulative evidence, it is unlikely that the testimony would have impacted the outcome of the trial in any way. Therefore, defendant has failed to show that he was prejudiced by counsel's failure to call other witnesses on defendant's behalf.

Defendant next claims that counsel was ineffective because counsel failed to adequately prepare him before he was called to testify. Defendant also claims that he did not understand that he had a right to refuse to testify. Even assuming that defendant was not extensively prepared before testifying, and that he did not understand he had the right to refuse to testify, defendant has not met his burden of proving that those shortcomings rendered counsel's performance ineffective in some demonstrable manner. Defendant makes no claim that his testimony would have been materially different if counsel had extensively prepared him before he was called to the witness stand. Nor does he claim that he would have chosen not to testify if he had understood that he had the right to refrain. In fact, it may be presumed that, if defendant told the truth on the witness stand, his testimony was not far different in substance than what would have been given if he had been coached by counsel. And, because defendant was the only witness

available to present his side of the story, it is likely that defendant would have chosen to testify even if he completely understood that he could refuse to do so.

Furthermore, although coaching witnesses is a routine practice, the amount of preparation needed is a tactical decision to be made by counsel. A witness who has been coached may appear out-of-character or phony to a jury. The best tactic may be to let the witness give his testimony in a natural manner. Therefore, defendant has failed to overcome the presumption that the amount of witness preparation was not a tactical decision that fell within the realm of reasonable trial strategy.

Finally, defendant has not established that, had he been more extensively prepared before testifying and had he understood that he could refuse to testify, the outcome of the trial would probably have been different. As noted above, it may be presumed that the substance of defendant's testimony would have remained the same, even with extensive coaching. Defendant's testimony indicates that, even though he does not believe he was adequately prepared, he was able to present his side of the story to the jury. Defendant's testimony included emphasis on the fact that he had been drinking all day before he stabbed Mr. Bovee (Tr. 246-250), and included his explanation that he had been struck nearly unconscious before he stabbed Mr. Bovee and that he did not intend to stab the victim (Tr. 253-54). Given that this information supported the defenses upon which defendant relied, it is unlikely that the testimony would have been materially different had he been coached before trial.

Consequently, it is unlikely that, had defendant been coached before he testified, the result of the trial would have been different.

Furthermore even if defendant did not understand that he had a right to refuse to testify and assuming that he would not have testified had he understood this alternative, it is virtually certain that the verdict would have been the same without defendant's testimony. Without defendant's testimony, the evidence overwhelmingly indicated that defendant intended to stab his victim. Randy Shaffer testified that defendant asked if he would tell the police if defendant stabbed Bovee and Mr. Shaffer testified that defendant had threatened to "mess (Mr. Bovee) up." Further an eyewitness testified that during the fight defendant was waiving his knife around, threatening Mr. Bovee. Such testimony would lead a jury inescapably to the conclusion that defendant intended to kill Mr. Bovee or, at least, to cause him serious bodily injury-mandating a verdict of second degree murder. Defendant's own testimony was the only evidence that defendant did not intend to stab Mr. Bovee. Thus, without that testimony the jury would have certainly reached the same verdict that they reached with the testimony. Therefore, defendant has failed to prove that he was prejudiced by the alleged failure of counsel to inform him of his fifth amendment rights.

Defendant next asserts that counsel's performance was inadequate because he failed to make "timely objections to numerous prejudicial questions, statements and rulings as he

objected only once during the whole trial." Defendant's allegation is, for the most part, completely unsubstantiated and, therefore, obviously does not prove that counsel's performance was deficient in some demonstrable manner. Defendant points to only once instance where he believes that objections should have been raised that were not. In that instance, counsel objected to a leading question asked by the prosecutor. The court sustained the objection, adding that the prosecutor had "been leading all day" (Tr. 148).

It has been established that whether to object to leading questions is a matter of trial strategy. Counsel may decide that it is unwise to object as it may draw undue attention to testimony that could be elicited without leading questions. State v. Garcia, 141 Ariz. 97, 685 P.2d 734, 740 (1984); State v. McNicol, 554 P.2d 203, 204-05 (Utah 1976) (the defendant claimed that counsel was ineffective because he raised only one objection to 165 leading or suggestive questions. The Court held that counsel's actions "fell within the ambit of an attorney's legitimate exercise of judgment as to trial tactics or strategy.")

In the instant case, the objectionable leading question was intended to elicit testimony about statements made by defendant to Randy Shaffer to the effect that he was considering stabbing Charles Bovee and was worried about whether Mr. Shaffer would tell the police about the stabbing. That testimony had previously been given in response to questions that were neither leading nor otherwise improper (Tr. 137-38). Defense counsel may

have concluded that repeated objections to the prosecutor's questions would do no more than emphasize the testimony for the jury. Therefore, defendant has failed to overcome the presumption that counsel's failure to object was a sound strategic decision.

Further, the crucial evidence against defendant was elicited without leading or otherwise improper examination. That testimony included Mr. Shaffer's testimony that showed defendant intended to stab Mr. Bovee and the testimony of two other eyewitnesses who stated that it appeared that during the fight defendant and Mr. Otto fought together against the victim and that defendant danced around, waiving the knife, before he stabbed Mr. Bovee (Tr. 97-98; 114; 120; 137-38). Consequently, it is unlikely that, even if defense counsel had raised repeated objections to any leading questions, the result of the trial would have been different. Therefore defendant has not established that he was prejudiced by counsel's failure to object to leading questions.

Defendant also asserts that counsel was ineffective because he did not request that juror Smuin be removed for cause and did not remove her with peremptory challenge. During voir dire the trial court asked if anyone felt that, because a person had been killed, defendant or someone was guilty. Ms. Smuin responded that she felt that, because someone had died, somebody, somewhere was guilty (Tr. 32). The court explained to the jury that they were to determine if it was defendant who was responsible for the death (Tr. 32). The trial court then asked

if anyone felt that defendant must be guilty because he was in court accused of the crime. Ms. Smuin responded negatively (Tr. 33). Ms. Smuin also indicated that, if she were the defendant in this case, she would feel comfortable having a juror in her frame of mind try the case (Tr. 44).

It has been established that the decision to challenge a juror is a matter of trial technique Stover v. State, 674 P.2d 566, 568 (Okla. Ct.Crim.App. 1984). In the instant case Ms. Smuin was extremely candid about her feeling that somebody was responsible if there was a death, yet she maintained that she would be able to give defendant a fair trial and that she did not presume that he was responsible merely because he was accused. Counsel was present to view Ms. Smuin's demeanor. He may very well have decided that Ms. Smuin's candor reflected an honesty and ability for introspection that might actually be beneficial to defendant. That decision should not be second guessed by this Court as it may have been a valid exercise of trial strategy.

Moreover, counsel need not raise futile objections. Codianna v. Morris, 660 P.2d 1101, 1109 (Utah 1983); State v. Malmrose, 649 P.2d 56, 59 (Utah 1982). Ms. Smuin did not express feelings that would justify excusing her for cause. Therefore, counsel's failure to raise an objection for cause did not render his performance ineffective.

Utah R. Crim. P. 18(e)(13) & (14) (Utah Code Ann. § 77-35-18(e)(13) & (14) (1982) set out two occasions when a prospective juror may be excused for cause due to bias. Utah R. Crim. P. 18(e)(13) states that a challenge for cause may be

granted if the potential juror "has formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offenses charged". That section is not applicable to the instant case. Ms. Smuin merely stated that she believed that somebody was responsible for the death (one might infer that Ms. Smuin included the victim himself as among the parties who might be responsible); she maintained that she did not have any preconceived notions about defendant's guilt.

Utah R. Crim. P. 18(e)(14) notes that, even where actual bias is not shown, a potential juror may be excused for cause if "a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging . . ." That standard has been interpreted to mean that a juror may be excused for cause if he or she has formed "strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force." State v. Hewitt, 689 P.2d 22, 25 (Utah 1984) (citing State v. Bailey, 605 P.2d 765, 767 (Utah 1980)). See also State v. Lacey, 665 P.2d 1311, 1312 (Utah 1983), State v. Brooks, 631 P.2d 878 883 (Utah 1981). Conversely, this Court has acknowledged that a potential juror should not be considered biased merely because he or she holds "(1) light impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony." State v. Bailey, 605 P.2d at 767 (citing

Chief Justice Marshall in Burr's Trial, at 416). Unfortunately, there is no bright line between "light impressions" that will not justify excusing a juror for cause and "strong impressions" that will. The instance in which this Court has most frequently found "strong impressions" amounting to implied bias is where potential jurors admit that they may be inclined to weigh testimony unequally. Such was the case in State v. Hewitt, 689 P.2d at 26, where this Court reversed the trial court for failure to dismiss a juror who declared that "if the evidence came anywhere near being close, then I would feel like the detectives deserve the benefit of the doubt . . ." Such was also the case in State v. Bailey, 605 P.2d at 767-68, where this Court held that it was prejudicial error to refuse to excuse a juror who had stated that he "probably would" give the testimony of a policeman more weight than the testimony of a witness who was not a policeman. Similarly, in Jenkins v. Parrish, a medical malpractice case, the Court held that a potential juror should have been excused for cause because she admitted that she would give more weight to the testimony of a witness simply because the witness was a doctor. 627 P.2d 533, 536-537 (Utah 1981).

Other cases in which this Court has found that the trial court erred by refusing to excuse a juror for cause include instances where the impressions held by the potential juror would by any standard, be considered strong enough to render the juror prejudiced. For instance, in State v. Brooks, a potential juror reported that she had been a victim of an armed robbery and assault in her home. She stated that her assailant had been

allowed to go without punishment and that she had "a very strong feeling about that." As a consequence of those feelings, the potential juror admitted that she "couldn't make an honest decision" about whether she could give the defendant the benefit of the presumption of innocence but, contrary to what common sense dictates, thought she could return a fair and impartial verdict 631 P.2d at 882-83. The Court held that refusing to dismiss that juror for cause was error. Id. at 884. Similarly, in Crawford v. Manning, the Court expressed doubt over whether a juror who had admitted having "strong feelings concerning anyone who would sue to recover money for the death of another" could be an impartial juror in a wrongful death suit. 542 P.2d 1091, 1092-93 (Utah 1975).

On the other hand, this Court on several occasions has refused to reverse a trial court's decision to retain a juror who was challenged for cause. See State v. Hewitt, 689 P.2d at 25-26; State v. Lacey, 665 P.2d 1311, 1312 (Utah 1983), State v. Malmrose, 649 P.2d 56, 70-6 (Utah 1983). In those cases, the jurors in question had some attribute that suggested that they were not totally unacquainted with the people that might be involved in the trial or that they harbored some light feelings about the crime involved or about their ability to perform as a juror. For instance, in State v. Hewitt, the Court concluded that, in a controlled substance distribution case, it was not error to refuse to excuse a juror who had experience in investigating drug offenses in the Army because the juror maintained that, despite that experience, he could judge the case

impartially. 689 P.2d at 25-26. And, in State v. Malmrose, the Court held that a juror who was otherwise impartial should not be excused for cause merely because she questioned whether she should hear the case. 949 P.2d at 61.

In the instant case the only indication of implied bias on Ms. Smuin's part was her statement that she believed that, because someone died, somebody somewhere was guilty. She maintained that she did not have any preconceived notion that defendant was the guilty party and she maintained that she could give defendant a fair trial. Those statements do not evidence strong impressions of the type that would justify dismissing Ms. Smuin for cause. Instead, they evidence her willingness to be persuaded by the evidence. Therefore, a challenge for cause would not have been justified and counsel properly decided not to raise such a challenge. Consequently, defendant has not met his burden of proving that counsel was ineffective because he failed to challenge Ms. Smuin for cause.

Finally, defendant asserts that defense counsel was ineffective because his opening and closing arguments were inadequate. Defendant claims that the arguments were inadequate because: 1. counsel failed to adequately argue defendant's theory of the case; 2. counsel failed to point out that intoxication was an important factor to consider in determining defendant's guilt; 3. counsel failed to instruct the jury on the distinction between second degree murder and manslaughter; and 4. counsel did not adequately explain the meaning of proof beyond a reasonable doubt.

The decision of whether to make an opening and closing argument, and of how long those arguments are to be, is a tactical decision. State v. Gutierrez, 618 P.2d 315, 317 (Hawaii 1980). As a consequence, even absolute waiver of closing argument will not be grounds for a finding of ineffective counsel because "in some cases the wisest trial tactic is to keep quiet" State v. Fojorquez, 138 Ariz. 495, 675 P.2d 1314, 1319 (Ariz. 1984). In the instant case, counsel decided to give a short opening statement that directed the jury's attention to defendant's pending testimony (Tr. 233-34). Counsel gave a rather extensive closing argument that emphasized the facts of the case and referred to the jury instructions to explain the law (Tr. 295-304).

In marshalling the facts for the jury, counsel emphasized the amount of alcohol defendant consumed before he killed Charles Bovee and noted that, at the time of the stabbing, defendant's blood alcohol level was twice the amount permitted under the drunken driving statute (Tr. 298). He also pointed out that defendant had received a blow right before the stabbing, claiming that the blow stunned defendant, and that the fatal stabbing was an accidental result of reentering the altercation in such a stunned state with a knife in hand (Tr. 301-02). counsel repeatedly asserted that the evidence failed to show that defendant intended to stab the victim (Tr. 302, 303, 304). Counsel also reminded the jury to keep the court's instruction on proof beyond a reasonable doubt in mind and to look at the distinction between the definition of second degree murder and

the lesser included offenses of manslaughter and negligent homicide to determine exactly what crime defendant had committed (Tr. 303-05).

The jury was explicitly informed that what the attorneys said was not evidence (Tr. 49, 60, 282). Further, they were ordered to apply the law as it was set forth in the jury instructions (Tr. 267). Therefore, it was a reasonable trial strategy for defense counsel to keep his arguments to a brief summary of the facts and to limit his discussion of the law to pointing out the jury instructions upon which he felt the jury should rely. Consequently, defendant has failed to overcome the presumption that counsel's opening and closing arguments fell within the realm of reasonable trial tactics.

Moreover, none of the deficiencies defendant claims existed in counsel's argument hold up under scrutiny. The first claim is that counsel failed to adequately present defendant's theory of the case. This Court has held that such a broad, unsubstantiated, allegation will not support a finding of ineffective assistance of counsel. See State v. Lairby, 699 P.2d 1187, 1204 (Utah 1984) (rejecting a claim of ineffective counsel based upon an allegation that counsel's inadequate arguments had denied the defendant the "opportunity to present the jury with an intelligent, cohesive description of their case."). Next, defendant complains that counsel failed to point out that intoxication was a factor to consider in determining the case. This claim is patently untrue as counsel's closing argument emphasized that defendant had been drinking extensively and was,

in fact, legally intoxicated when the stabbing occurred. Furthermore, even if counsel failed to adequately inform the jury of the defense of intoxication, the failure could not have affected the verdict because jury instruction 11, (Tr. 276), specifically noted that defendant claimed that he was intoxicated at the time of the offense and set out the standard for a defense of intoxication. Defendant's two final contentions, that counsel's argument was defective in that it failed to outline the distinctions between second degree murder and manslaughter and failed to explain the standard of proof beyond a reasonable doubt, are also groundless. Defense counsel specifically directed the jury's attention to the court's instructions on proof beyond a reasonable doubt and on the definition of second degree murder and the lesser included offenses. In addition, even if counsel were required to do more than direct the jury's attention to the relevant law as set out by the court, that shortcoming could have had no effect on the outcome of the trial because the trial court thoroughly instructed the jury on the standard of proof beyond a reasonable doubt (Jury Instructions 3 & 4, Tr. 267-68) and on the definition of second degree murder and the lesser included offenses of manslaughter and negligent homicide (Jury Instructions 6-10, Tr. 269-76). Consequently, any further argument on those points would have been merely cumulative and there is no reasonable likelihood that it would have changed the jury's verdict. Therefore, defendant has failed to establish that any shortcoming in counsel's opening or closing arguments rendered his performance constitutionally inadequate.

Furthermore, looking at defense counsel's performance on the whole, it is apparent that he zealously and competently represented defendant. Before trial, counsel succeeded in convincing the court to suppress evidence that was obtained in violation of defendant's right to privacy (R. 34-35). During trial, counsel cross-examined ten out of the thirteen witnesses called by the State. At the end of the State's case, counsel moved for dismissal on the grounds that, by failing to prove the necessary mens rea, the State had failed to make out a prima facie case of second degree murder (Tr. 264-65). In view of the strong evidence against defendant, it is not surprising that defense counsel's strategy did not prevail.

In retrospect, defendant asserts that counsel could have done things differently. But "[t]he object of an ineffectiveness claim is not to grade counsel's performance." State v. Lairby, 699 at 1204 (citing Strickland v. Washington, 104 S.Ct. at 2070). However he fails to prove that the performance was ineffective in some demonstrable manner, fell outside the realm of reasonable trial tactics, or was inadequate in such a way that it impacted the jury's verdict. Consequently, defendant failed to prove that counsel's performance was constitutionally deficient and the trial court properly refused to grant a new trial based upon defendant's claim of ineffective counsel.

CONCLUSION

Based on the foregoing arguments, the judgment of the court below should be affirmed.

Dated this 28th day of April, 1986.

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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Brief, postage prepaid to Kirk C. Bennett, 319 West 100 South, Suite B, Vernal, Utah 84076, this 25th day of April, 1986.

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